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In The
Supreme Court of the United States

WILLIAM CRAWFORD, ET AL.,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, ET AL.,

Respondents.

INDIANA DEMOCRATIC PARTY, ET AL.,

Petitioners,

v.

TODD ROKITA, IN HIS OFFICIAL CAPACITY AS INDIANA SECRETARY OF STATE, ET AL.,

Respondents.

On Writs of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, NAVAJO NATION, AND AGNES LAUGHTER IN SUPPORT OF PETITIONERS
[Impact on Native Americans]

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus National Congress of American Indians ("NCAI") is the oldest and largest national organization representing the interests of American Indians. NCAI's membership includes 250 Indian tribes and their members, which account for approximately 72% of all enrolled tribal members in the United States.[2]

Amicus Navajo Nation is a federally recognized Indian tribe and is the largest tribe in the United States, comprising over 250,000 members and occupying approximately 25,000 square miles of trust lands within Arizona, New Mexico, and Utah.[3] The Navajo Nation is one of several plaintiffs in an

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1 The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

2 NCAI member the Pokagon Band of Potawatomi Indians' service area includes six counties in northern Indiana: "The Band's service area shall consist of the Michigan counties of Allegan, Berrien, Van Buren, and Cass and the Indiana counties of La Porte, St. Joseph, Elkhart, Starke, Marshall, and Kosciusko." 25 U.S.C. § 1300j-6 (2000).

3 According to the 2000 U.S. Census, approximately 180,000 individuals live on the Navajo Reservation, approximately 97% of whom are American Indian. U.S. Census Bureau, NAVAJO RESERVATION DEMOGRAPHIC PROFILE: 2000, Table DP-1, *available at* http://censtats.census.gov/data/US/502430.pdf.

action currently pending in the District of Arizona that challenges Arizona's voter ID statute.[4]

Amicus Agnes Laughter is an elderly Navajo woman from rural Chilchinbeto, Arizona, who was denied the right to vote in the 2006 Arizona primary and general elections because she was unable to present a valid form of identification to poll workers. Ms. Laughter is a co-plaintiff with the Navajo Nation in its challenge to the Arizona voter ID statute.

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[4] *Navajo Nation, et al. v. Jan Brewer*, 06-1575 (D. Ariz.). After the Navajo Nation filed its lawsuit, the case was consolidated with the other challenges to the Arizona statute, and all plaintiffs filed motions for preliminary injunction. The day before the 2006 Primary Election, the district court denied the plaintiffs' motions for preliminary injunction and ordered supplemental briefing to re-examine the Navajo Nation Plaintiffs' Voting Rights Act and Civil Rights Act claims. *Gonzalez v. Arizona*, Nos. CV 06-1268, 06-1362 & 06-1575, 2006 U.S. Dist. LEXIS 93477 (D. Ariz. Sept. 11, 2006). On appeal, the motions panel of the Ninth Circuit enjoined the voter identification requirement for the 2006 General Election. This Court vacated the injunction because the motions panel failed to provide reasons for its action and the Court could not determine whether the motions panel had given appropriate deference to the district court. *See Purcell v. Gonzalez*, 127 S. Ct. 5 (2006). The district court subsequently denied the Navajo Nation's motion for preliminary injunction. At a recent scheduling conference, the district court judge informed the parties that she will not schedule a trial date until this Court decides the constitutionality of the Indiana voter identification statute. The three consolidated cases are captioned *Gonzalez v. Arizona*, Nos. CV 06-1268, 06-1362 & 06-1575 (D. Ariz.).

NCAI, the Navajo Nation, and Ms. Laughter file this brief as *amici curiae* because at least one in five Native Americans, including Ms. Laughter, does not have a photo ID issued by a state or the federal government. Many American Indians and Alaska Natives, particularly elders, continue to live traditional lifestyles in small communities in rural and remote areas where they rely on a combination of tribal and federal services for Native Americans that do not require any form of identification. In addition, many tribal members use tribal-government-issued ID cards as their sole form of ID when they need an ID for travel, voting, or business. Many lack the birth certificates—or even utility bills—necessary to obtain state ID cards. Rural locations, language assistance needs, and poverty create additional barriers to obtaining state-issued identification.

Amici agree with Petitioners that the Indiana statute is unconstitutional. Moreover, *Amici* are concerned that if the decisions below are affirmed, other states where there are large American Indian and Alaska Native populations will be encouraged to pass similarly restrictive voter identification statutes. This would disenfranchise many American Indian and Alaska Native voters who cannot shoulder the financial and administrative burdens associated with obtaining a photo ID issued by a state or the federal government.

SUMMARY OF ARGUMENT

Voter ID statutes place a severe and disproportionate burden on otherwise eligible

American Indian and Native Alaskan voters. Nationally, at least one in five voting-age Native Americans lacks a photo ID issued by a state or the federal government. These Americans' participation in local, state, and national elections has increased steadily since Congress passed the Voting Rights Act in 1965.[5] Because these Americans have never had the need for, nor access to, a photo ID issued by a state or the federal government, however, they once again find themselves in danger of being disenfranchised. In light of the burden the Indiana statute places on Native Americans—in light of the burden it places on all Americans—the Court should find that the statute violates the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

I. NATIONALLY, ONE IN FIVE VOTING-AGE AMERICAN INDIANS DOES NOT HAVE A PHOTO ID ISSUED BY A STATE OR THE FEDERAL GOVERNMENT.

Last year, *Amicus* Agnes Laughter, an elderly Navajo woman from rural Chilchinbeto, Arizona, was denied the right to vote in the Arizona primary and general elections because she was unable to present a valid form of identification to poll workers. Her experience is all too common among Native Americans.

Like the Indiana statute, Arizona currently requires all voters to present identification at the

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5 42 U.S.C. §§ 1971, *et seq.* (Supp. 2007).

polls before casting a ballot.[6] Arizona is less strict than Indiana in that Arizona permits voters to cast a ballot if they otherwise can produce either (1) a government-issued photo ID with the elector's name and registration address or (2) two of the following forms of identification with the voter's name and registration address: current utility bill, bank or credit union statement, Indian census card, property tax statement, tribal enrollment card or tribal identification, vehicle insurance card, or a recorder's certificate.[7] Next to Indiana, Arizona's statute is one of the strictest in the country.[8] Like the Indiana statute, the Arizona statute places a difficult burden on Native Americans like Agnes Laughter.

Prior to the Arizona statute's enactment in 2004, Ms. Laughter voted in nearly all tribal, state, and federal elections since this Court enjoined Arizona's

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6 Ariz. Rev. Stat. Ann. § 16-579 (2006).

7 The Arizona Secretary of State adopted a list of documents acceptable under the statute, limiting the types of documents allowable under the new voter identification requirements. Arizona Secretary of State Jan Brewer, Proof of Identification at the Polls, http://www.azsos.gov/election/Prop_200/poll_identification.htm (last visited Nov. 11, 2007).

8 As enacted, Missouri's voter ID statute was similar to Indiana's, accepting only certain photo IDs issued by the state or the federal government. Mo. Rev. Stat. § 115.427 (2006). In 2006, however, the Missouri Supreme Court found that the statute violated the Missouri Constitution, observing that it placed a substantial burden on the fundamental right to vote, was thus subject to strict scrutiny, and was not narrowly tailored. *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006).

literacy test in *Oregon v. Mitchell*, 400 U.S. 112 (1970), clearing the way for Navajos like Ms. Laughter to exercise their rights to vote.[9]

On September 12, 2006, Ms. Laughter went to vote at her usual polling location, the Chilchinbeto Chapter House.[10] Two poll officials greeted her immediately and asked if she had identification. She did not. They told her to wait outside while they went inside the Chapter House to speak with someone. Five minutes later, they emerged and invited her into the polling station. Inside, Mary Yazzie, a poll worker, recognized Ms. Laughter and greeted her in the Navajo language. Ms. Yazzie acknowledged Ms. Laughter as her older sister through their maternal clan Red-Running-into-the-Water. Ms. Laughter and her family are well known in the community. Her son is the Chilchinbeto Chapter Vice President. Nevertheless, Ms. Laughter was not permitted to vote. The election officials, conscientious of their official duties and despite their ability to personally confirm her identity, could not

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9 At the time, the Court observed that "Arizona has a serious problem of deficient voter registration among Indians." *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970).

10 Chilchinbeto is located north of the Navajo-Hopi partitioned lands, in the middle of the Navajo Reservation. According to the 2000 Census, Chilchinbeto has a population of 1,325. LSR Innovations, CHAPTER IMAGES: 2004, PROFILES OF 110 NAVAJO NATION CHAPTERS 63 (Navajo Nation Div. of Community Development 2004), *available at* http://chilchinbeto.nndes.org/cms/kunde/rts/chilchinbetonndesorg/docs/429374980-09-27-2004-14-01-27o.pdf.

allow Ms. Laughter to circumvent the statutory identification requirement.

Agnes Laughter's lack of qualifying identification is representative of a significant number of American Indians across the country who, like Ms. Laughter, have no form of photo ID whatsoever. Many others have only the photo IDs that some tribal governments issue to their members,[11] and these do not qualify under the Indiana statute because they were not issued by a state or the federal government.

Moreover, as discussed below, for traditional American Indians and Alaska Natives living on rural reservations, it is no easier to acquire the other documents that states like Arizona accept as valid

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[11] *Amicus* Navajo Nation does not issue tribal IDs to its members. Members do not need identification to obtain services on the Navajo Reservation or to vote in tribal elections. Under the Navajo belief system, identity is confirmed through the traditional kinship system, which is used in the everyday life of Navajos. Testimony of Leonard Gorman, Prel. Inj. Hr'g Tr. 58, 60-63, in *Gonzales v. Arizona*, No. 06-1268 (D. Ariz. Aug. 30, 2006), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitEx120.pdf. The Navajo Nation has considered creating ID cards but has not done so because of the expense to institute and run such a program. To issue tribal ID cards, the Navajo Nation would be required to create an office and allocate operating funds in at least each of the five agencies located on the Navajo Reservation. After Arizona developed voter ID requirements, the Navajo Nation considered creating a tribal ID program and requested monetary assistance from the Arizona legislature to develop such a system, but it received no offer of assistance.

identification than it would be to obtain a photo ID issued by a state or the federal government. During the 2006 election cycle, 428 Navajos living on the Navajo Reservation in Arizona completed conditional provisional ballots that were never verified with one of the statutory forms of identification, and, therefore, were never counted.[12]

Amicus NCAI estimates that if the rest of the states were to amend their voter identification laws to require a photo ID issued by a state or the federal government, over 20% of otherwise eligible Native Americans would no longer be able to vote.

II. MANY AMERICAN INDIANS AND ALASKA NATIVES LIVE IN COMMUNITIES WHERE THEY HAVE NEVER NEEDED A PHOTO ID, AND IT IS A SEVERE BURDEN FOR THEM TO OBTAIN PHOTO ID CARDS ISSUED BY THE STATE AND FEDERAL GOVERNMENTS.

In its opinion, the court of appeals expressed incredulity that anyone can function in today's society without obtaining some form of identification. Although this may be true for a majority of Americans, many American Indians and Alaska Natives, particularly elders such as Amicus Agnes

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[12] This number does not include individuals who did not fill out a provisional ballot because they knew they would not be able to return and produce the required identification. Some Navajo elders reported that they would not be voting in elections due to the voter identification requirements, and election day technicians in Coconino County, Arizona observed individuals who entered the polling place and walked out without voting during the 2006 Arizona Primary Election.

Laughter, continue to live in traditional ways in rural and remote areas, in small communities, and rely upon a combination of tribal and federal services that do not require any form of identification. Moreover, many American Indians and Alaska Natives lack the underlying documentation needed to obtain a photo ID issued by a state or the federal government. The associated information and transaction costs make obtaining a state- or federal-issued ID card for the purposes of voting infeasible, if not impossible for a substantial number of American Indians and Alaska Natives. Ms. Laughter, for example, traveled to several locations, approximately 90-115 miles from her home, in unsuccessful attempts to obtain identification. She failed to obtain a state ID because she lacks the underlying documents, specifically a birth certificate.

Many people who visit Indian reservations get an impression of going back in time to an earlier era. The economy on most reservations is a cash economy, where paychecks and government checks are cashed at local stores and businesses. Hunting, fishing, gathering, and gardening for subsistence still form an important part of the culture and diet. Large families live close to each other, and food and resources are shared. Homes are often heated with firewood, and water comes from wells or is hauled from streams. In these close-knit rural communities, ID cards are not needed for everyday life, much as

they were unnecessary for all Americans throughout most of our country's history.[13]

Requiring American Indians and Alaska Natives to obtain a state or federal ID for the sole purpose of voting imposes a severe financial and administrative burden on their rights to vote and disenfranchises those who cannot readily shoulder this burden.

A. Many American Indians and Alaska Natives Lack Access to the Underlying Documents Required to Obtain State and Federal ID Cards.

American Indians and Alaska Natives are much more likely than the general population to lack the underlying documentation (*e.g.*, birth certificate, utility bills, bank statements, other proof of residence) required to obtain a state- or federal-issued ID card.

Many Native Americans were born at home and do not possess a birth certificate.[14] In addition, the Indian Health Service did not start issuing birth

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[13] Nor do tribal members typically need state ID cards to purchase restricted commercial products, such as hunting or fishing licenses, firearms, ammunition, alcohol, or tobacco on reservations. In the rural communities around Indian reservations, most businesses do not require identification of well-known or elderly persons, and they otherwise will accept tribal or BIA identification cards.

[14] T. Vanderpool, *Rites of Passage*, TUCSON WEEKLY, Feb. 23, 2007 ("With our way of life here on the reservation, we don't always have documents," says Henry Ramon, vice chairman of the Tohono O'odham Nation. "We were born in our homes, and don't have (birth certificates). Even those who volunteered to fight in the war don't have birth certificates.").

certificates until the 1960's. In a survey conducted by *Amicus* NCAI, tribal leaders reported that 20% of the reservation population does not have a birth certificate. By example, the Tohono O'odham Nation in Arizona estimates that approximately 7,000 members (of their 28,000 members) were born at home, not in a hospital, and are unable to meet the statutory requirements to obtain a birth certificate.[15] In addition, of those Native children who were born in Indian hospitals, there were long periods of time when the Indian Health Service simply entered "Indian Boy" or "Indian Girl' on a birth certificate, therefore rendering the birth certificate largely useless for identification purposes. Requesting a "delayed birth certificate" or correcting the name on an existing birth certificate can be a very time-consuming and costly process. The State of Arizona, for example, cautions that "filing for a Delayed Birth Certificate can be a lengthy process, taking up to one year to complete."[16]

American Indians living on reservations are much more likely to have no traditional street address,

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[15] NCAI Comments to Notice of Proposed Rulemaking: Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere (WHTI-Land Regs) (August 27, 2007), *available at* http://www.ncai.org/ncai/whti/NCAICommentsWHTINPRMAugust2007FINAL.pdf.

[16] Office of Vital Records, Div. of Public Health Services, Arizona Dept. of Health Services, Delayed Birth Certificates, http://www.azdhs.gov/vitalrcd/delayed_birth.htm (last visited Nov. 9, 2007).

utility bills, lease, or other documentation commonly required by states to prove residency. Of the nearly 56,000 miles of Indian reservation roads, over two-thirds are unimproved dirt or gravel roads. Only 11.6% of the roads are found to be in "good condition" and many miles of these roads are impassable after rain or snow.[17] Because of the poor quality of the road systems on Indian reservations, many of the roads are unnamed and not serviced by the U.S. Postal Service. As a result, most reservation residents do not receive mail at their homes and either pay to maintain a post office box in a nearby town or receive their mail by general delivery at a trading post or other location. Some reservation residents may have to travel up to seventy miles in one direction to receive mail. A significant number of these reservation residents have no traditional street addresses.

In addition, Native people are much more likely than the general population to live without many of the utilities common in most American households. Thus, these Americans have no utility bills to prove their identity or residence. Approximately "14.2 percent of Indian households have no access to electricity, as compared to only 1.4 percent of all U.S. households. The Navajo Nation alone accounts for 75 percent of the households without

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[17] Bureau of Indian Affairs, TEA—21 REAUTHORIZATION RESOURCE PAPER: TRANSPORTATION SERVING NATIVE AMERICAN LANDS (May 2003).

electricity."[18] Nearly 20 percent have no phone service, compared with 2.4 percent nationally. Native American homes are also ten times more likely to be overcrowded than other American homes, further increasing the likelihood that an eligible voter will be living in someone else's home or another situation where he or she has no documentation to prove residence.[19]

Native people living on reservations are also much less likely than other Americans to have a traditional bank account. Only 14 percent of Indian communities (excluding Alaska) have a financial institution in the community and 15 percent of Native people must travel more than 100 miles to reach a bank or automatic teller machine.[20] However, over 200,000 American Indians have BIA trust accounts that provide income from leasing or sale of land and natural resources. These accounts are often used in lieu of a bank account, and also do

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18 President's Fiscal Year 2005 Budget Request for Indian Programs: Hearing Before the S. Comm. on Indian Affairs, 108th Cong. (2004) (testimony of David K. Garman, Ass't Sec'y U.S. Dep't of Energy Office of Energy, Efficiency and Renewable Energy), *available at* http://www1.eere.energy.gov/office_eere/congressional_test_022504.html.

19 National American Indian Housing Council, TOO FEW ROOMS: RESIDENTIAL CROWDING IN NATIVE AMERICAN COMMUNITIES AND ALASKA NATIVE VILLAGES (2001), *available at* http://www.naihc.net/research/index.asp.

20 Community Development Finance Institution Fund, U.S. Treasury Dept., REPORT OF THE NATIVE AMERICAN LENDING STUDY 14 (2001), *available at* http://www.cdfifund.gov/what_we_do/nacd/lending_study.asp.

not require the use of an identification card. Bills are often paid in cash or with money orders. Well-known persons in small communities often do not need identification to cash checks, and they can otherwise use tribal or BIA identification cards.

Amicus Agnes Laughter has tried on two occasions to obtain a state photo ID card, but she was denied on both occasions because she does not have a birth certificate. She also does not have utility bills in her name. Like many people in her community, her husband built their home, which has no electricity, no running water, and is heated with firewood. Her home is on a dirt road three miles from the nearest paved highway. She does not drive; she relies on her husband and other family members for transportation. In the past, before the passage of Arizona's current voter ID statute, her identity at the polls was verified with her inked thumbprint on her ballot.

B. Many American Indians and Alaska Natives Lack Access to the Language Assistance They Need to Obtain State and Federal Identification.

Language barriers create additional challenges for American Indians and Alaska Natives, who need language assistance to obtain a photo ID. Data from the 2000 census indicates that American Indians and Alaska Natives are at least twice as likely as other Americans to speak English "less than very well." Although Section 203 of the Voting Rights Act ("VRA") protects the right of these Native language speakers to have access to all materials and information needed for voting in their Native

languages,[21] this protection does not extend to the services offered by state agencies that issue ID cards.

C. Many American Indians and Alaska Natives are Unable to Obtain State or Federal ID Cards Because of Poverty and Geographic Isolation.

Most states charge a fee for obtaining a state-issued ID card, with costs ranging from $5.00 to $29.00.[22] Moreover, this cost, which may be prohibitive for individuals living in severe poverty or on a fixed income, is compounded for the many American Indians and Alaska Natives who live in remote, isolated locations. Given the remote nature of many tribal communities, these costs are often substantially higher for Native Americans than they would be for individuals living in an urban setting.

For example, individuals living in a remote portion of the Navajo reservation may have to travel several hours to get to the nearest location where a state-issued ID can be obtained. The cost of gas alone may preclude individuals on a limited budget from making this trip to obtain an ID card. Of course, this is assuming that the individual has access to a car in the first place. The 2000 U.S. Census indicates that Native Americans are twice as likely to have no vehicle available to them—14%,

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21 42 U.S.C. § 1973aa-1a (Supp. 2007).

22 As explained in Rep. Keith Ellison's amicus brief, in light of these pre-requisite costs, photo ID statutes like the Indiana statute are modern-day poll taxes in violation of the Twenty-fourth Amendment.

compared with 7% in the general population—and only about 6% of tribes have a public transit system.[23]

In Alaska, in a 75,000 square mile area there is only one state office, a branch office of the Division of Motor Vehicles ("DMV"), where someone can get a driver's license or state ID card. Last year this state office was only open for two months, and this office is only accessible from many Alaska Native Villages through air travel ranging in cost from $600 to $800. Alaskan DMV offices are heavily concentrated in the more urban areas of Southeast Alaska, where the population is largely non-Native, while the Alaska Native population is concentrated in Western and Northern Alaska.[24]

The remote location of many American Indian and Alaska Native communities compounds the

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23 Bureau of Indian Affairs, TRANSPORTATION SERVING NATIVE AMERICAN LANDS: TEA-21 REAUTHORIZATION RESOURCE PAPER (2003).

24 Indian reservations in the lower 48 states are also located at great distances from state offices. In Montana, from the Blackfeet Reservation, the closest exam center is in Kalispell 178 miles away. From the Fort Peck Reservation, the closest exam center is in Plentywood, approximately 131 miles away. In South Dakota, from the Cheyenne River Reservation, the closest exam center is 60 miles away. From the Pine Ridge Reservation, the closest exam center is 45 miles away. In New Mexico, from the Zuni Pueblo, one would either go to Gallup, which is approximately 64 miles away or Grants, which is approximately 70 miles away. These distances would pose a very significant burden for that percentage of the American Indian population that does not have access to an automobile.

severe poverty Native people experience, who suffer from the highest rates of poverty in the country. According to 2000 census data,[25] American Indians and Alaska Natives living on reservations have an average real per capita income of $12,452,[26] significantly lower than the national average of $41,944. Among tribal members, 49% of the

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25 For a number of reasons census data is problematic when talking about American Indians and Alaska Natives. The census does not differentiate between individuals who are enrolled members of a tribe and those who self-identify as American Indian or Alaska Native, but are not associated with any tribal group. Additionally, the census generally does not distinguish between American Indians and Alaska Natives who live on reservations and those who have migrated to a non-Indian community or urban area. For these reasons, it is generally assumed that the disparities in income, employment, and well-being that are reflected in the census between Natives and non-Natives would be even more severe if data existed for on-reservation communities alone. A good example of this is the unemployment statistics. According to the census, 12% of American Indian and Alaska Natives are unemployed. The BIA Labor Force Report, which covers only enrolled members of a federally-recognized Indian tribe living on or near a reservation, reports unemployment rates to be significantly higher at 49%. Office of Tribal Services, Bureau of Indian Affairs, U.S. Interior Dept., AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, at ii (2003), *available at* http://www.doi.gov/bia/laborforce/2003LaborForceReportFinalAll.pdf (hereinafter "2003 BIA LABOR REPORT").

26 See Trib Choudhary, NAVAJO NATION DATA FROM US CENSUS 2000, T33 – Important Data on American Indian Tribes and Alaska Natives, *available at* http://www.navajobusiness.com/pdf/NNCensus/Census2000.pdf.

available labor force is unemployed.[27] Of the 51% of tribal members who are employed, 32% earn wages below the 2003 poverty guidelines established by the United States. In Indiana, the Pokagon Band of Potowatami has 173 members eligible for services from the tribe. Of these members, 28% are unemployed and 33% of those who are employed are paid below the poverty level.[28]

III. MANY NATIVE AMERICANS RELY ON TRIBAL IDS AS THEIR SOLE FORM OF IDENTIFICATION.

Although not all tribes issue IDs to their members,[29] there are a significant number of American Indians and Alaska Natives living both on and off the reservations who rely on tribal IDs as their sole government-issued form of identification.

Tribal governments exercise inherent sovereign powers over their members and territory, and perform many traditional and modern government functions. This often includes the issuing of ID cards to members. In Indiana, for example, upon enrollment with the Pokagon Band, a member age 14 years or older is issued a membership card. Since 2001, all Pokagon membership cards contain the member's picture. Members who live within the Band's service area may visit the Band's Enrollment Office to obtain their photo membership card. Those

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27 2003 BIA LABOR REPORT, *supra* note 25, at ii.

28 *Id.* at app. (Local Estimates of Indian Service Population and Labor Market Information, at 7).

29 *Amicus* the Navajo Nation does not issue tribal IDs *See supra* note 11.

members who do not live within the Band's service area must submit a picture and signature along with a notarized statement that the picture and signature is the member's own.[30]

In light of the strong federal policy encouraging tribal sovereignty and self-determination, the federal government and most states extend comity to tribal governments and accept tribal ID cards where they otherwise would require a state or federal ID.

For example, in implementing the Intelligence Reform and Terrorism Prevention Act of 2004, the Departments of State and Homeland Security recently proposed tough new border crossing identification restrictions that nonetheless specifically permit members of U.S. border tribes to continue to cross between the U.S. and Mexico using tribal enrollment cards as identification.[31]

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30 Pokagon Band of Potawatomi Indians, Comments on Proposed Rulemaking Regarding Documents Required for Travelers Departing from or Arriving in the United States at Sea and Land Ports-of-Entry from Within the Western Hemisphere (August 21, 2007), *available at* http://www.ncai.org/ncai/whti/PokagonWHTIComments.pdf. Most tribes have particularly rigid standards and procedures that must be met before a membership card will be issued, including specific requirements regarding identity and ancestry. The Pokagon Band and most other tribes also have laws in place to protect against fraud and forgery. *Id.*

31 Documents Required for Travelers Departing from or Arriving in the United States at Sea and Land Ports-of-Entry from Within the Western Hemisphere, 72 Fed. Reg. 35088, 35099 (proposed June 26, 2007) (to be codified at 8 C.F.R. pts. 212 & 235, and 22 C.F.R. pts. 41 & 53).

The Help America Vote Act of 2002 (HAVA) instructs states to offer voters who are required to present identification before voting the option of showing any "current and valid photo identification," in addition to several non-photograph forms of identification.[32] Presently, eight states expressly accept tribal IDs as valid identification in state and national elections: Arizona, Georgia, Minnesota, Montana, North Dakota, South Dakota, Utah, and Washington.[33] Only Indiana and Missouri expressly limit their lists of acceptable forms of identification to photo IDs issued by the state and federal government.[34] All other states either follow the HAVA requirements or allow voters to show proof of identity through documents that have not been issued by a state or the federal government; these statutes would seem to permit poll officials to accept photo IDs issued by tribal governments.[35]

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32 42 U.S.C. § 15483(b)(2)(A) (Supp. 2007).

33 Ga. Code Ann. § 21-2-417(a)(6) (2007); Minn. Stat. § 201.061(3)(d) (2007); Mont. Code Ann. § 13-13-114(1)(a) (2007); N.D. Cent. Code § 16.1-05-07(1)(b) (2007); S.D. Codified Laws §12-18-6.1(3) (2007); Utah Code Ann. § 20A-1-102(76)(a)(vii), (b)(xii), (b)(xiii) (2007); Wash. Rev. Code § 29A.44.205 (2007); *see* Arizona Secretary of State Jan Brewer, Proof of Identification at the Polls, http://www.azsos.gov/election/Prop_200/poll_identification.htm (last visited Nov. 11, 2007) (specifying that Arizona will accept tribal IDs, pursuant to Ariz. Rev. Stat. Ann. § 16-579 (2006)).

34 As to Missouri, see *supra* note 8.

35 *See* Ala. Code § 17-9-30(a), (b), (e) (2007); Alaska Stat. §15.15.225 (2007); Ark. Code Ann. § 7-5-305 (2007); Cal. Code Regs. tit. 2 § 20107 (2006); Colo. Rev. Stat. § 1-7-110

Last year, Minnesota adopted a general rule of statutory interpretation that "If a Minnesota identification card is deemed an acceptable form of identification in Minnesota Statutes or Rules, a tribal identification card is also an acceptable form of

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(2007); Conn. Gen. Stat. Ann. § 9-261(a) (2007); Conn. Gen. Stat. Ann. § 9-23r(d) (2007); Del. Code Ann. tit. 15 § 4937 (2007); Del. Code Ann. tit. 15 § 7554 (2007); D.C. Code § 1-1001.07(i)(6) (2007); Fla. Stat. Ann. § 97.0535(3) (2007); Haw. Rev. Stat. § 11-136 (2007); Idaho Code Ann. § 34-410 (2007); 10 Ill. Comp. Stat. 5/17 10 (2007); Iowa Code § 48A.8 (2007); Kan. Stat. Ann. § 25-2908(d) (2006); Ky. Rev. Stat. Ann. §117.227 (2007); Ky. Rev. Stat. Ann. § 117.245 (2007); La. Rev. Stat. Ann. § 18:562 (2007); Me. Rev. Stat. Ann. tit. 21-A § 121 (2007); Me. Rev. Stat. Ann. tit. 21-A § 222 (2007); Md. Code Ann., Elect. Law § 10-312 (2007); Mass. Gen. Laws ch. 54, § 76B (2007); Mich. Comp. Laws § 168.523 (2007); Miss. Code Ann. § 23-15-169.2 (2007); Neb. Rev. Stat. § 32-914 (2006); Neb. Rev. Stat. § 32-927 (2006); Nev. Rev. Stat. § 293.2725 (2007); Nev. Rev. Stat. § 293.277 (2007); N.H. Rev. Stat. Ann. § 654:12 (2007); N.J. Stat. Ann. § 19:15-17 (2007); N.M. Stat. Ann. § 1-12-7.1(D) (2007); N.M. Stat. Ann. § 1-1-24 (2007); N.Y. Elect. Law § 8-302 (2007); N.C. Gen. Stat. § 163-166.12 (2007); Ohio Rev. Code Ann. § 3505.18(A)(1) (2007); Okla. Stat. tit. 26, § 7-115.2 (2007); Or. Rev. Stat. § 247.973 (2005); 25 Pa. Stat. Ann. 25, § 3050 (2007); R.I. Gen. Laws § 17-19-24.1 (2007), R.I. Gen. Laws § 17-15-26 (2007); S.C. Code Ann. § 7-13-710 (2006); Tenn. Code Ann. § 2-7-112 (2007); Tex. Elec. Code Ann. § 63.001 (2007), Tex. Elec. Code Ann. § 63.008 (2007), Tex. Elec. Code Ann. § 63.0101 (2007); Vt. Stat. Ann. tit. 17, § 2563 (2007); Va. Code Ann. § 24.2-643(B), (E) (2007); W. Va. Code § 3-2-10 (2007); Wis. Stat. § 6.34(2) (2007), Wis. Stat. § 6.34(3) (2007); Wyo. Stat. Ann § 22-3-118 (2007); *see also*, Ariz. Rev. Stat. Ann. § 16-579 (2007) (discussed *supra* note 33).

identification."[36] Maine and Wyoming have similar statutes.[37]

In Chicago, tribal members can pass through security at O'Hare International Airport or enter the Dirksen Federal Building to observe oral arguments before the Seventh Circuit Court of Appeals using their tribal ID cards.[38]

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36 Minn. Stat. Ann. § 171.072 (2006). The Friday before the 2004 Presidential Election, the District of Minnesota granted a temporary restraining order requiring Minnesota to accept the tribal IDs of Indians living off reservations. *ACLU of Minnesota, v. Kiffmeyer*, No. 04-CV-4653, 2004 WL 2428690 (D. Minn. Oct. 28, 2004). The Minnesota Secretary of State had issued a memorandum shortly before the election instructing officials that they were only to accept tribal IDs from tribal members who actually resided on a reservation. In addition to the ACLU and *Amicus* NCAI, plaintiffs in *Kiffmeyer* included Bonnie Dorr-Charwood, an enrolled member of the Mille Lacs Band of Ojibwe, and Richard Smith and Tracy Martineau, enrolled members of the Fond du Lac Band of Lake Superior Chippewa, all three of whom had no form of photo ID other than their tribal ID cards.

37 *See* Me. Rev. Stat. Ann. tit. 29-A § 1410 (2007); Wyo. Stat. Ann § 8-7-101 (2007).

38 Telephone interview with Dirksen Federal Building Security Services (Nov. 9, 2007); *see* Transportation Security Administration, The Screening Experience: What Do You Need, http://www.tsa.gov/travelers/airtravel/screening/index.shtm (last visited Nov. 9, 2007) (encouraging adult travelers to bring with them any "government-issued photo ID" and warning travelers only that the "absence of proper identification will result in additional screening").

In short, about the only thing tribal members cannot do with their tribal ID cards that they could do with a state or federal ID is vote in Indiana. Indiana's failure to extend comity and accept tribal ID cards at the polls undermines the sovereign status of American Indian and Alaska Native tribal governments and unreasonably burdens the right to vote.

IV. STATE AND LOCAL LEGISLATURES HISTORICALLY HAVE RELIED ON TIME, PLACE, AND MANNER VOTING REGULATIONS LIKE VOTER ID REQUIREMENTS TO PREVENT AMERICAN INDIANS AND ALASKA NATIVES FROM VOTING.

American Indians and Alaska Natives realize that the best way to protect their rights is through active participation in the political system. There are approximately 1.9 million people who are enrolled members of one of the 562 federally recognized Indian tribes.[39] In 2004, American Indians voted in record numbers and their participation was credited as outcome determinative in several races.[40] Historically, however, American Indians and Alaska Natives have been forced to resort to the courts to protect their ability to

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39 2003 BIA LABOR REPORT, *supra* note 20, at ii..

40 *See, e.g.*, Daniel McCool, Susan M. Olson & Jennifer L. Robinson, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 177-183 (2007); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 270-271 & n.7 (2004) (quoting Michael Barone, Grant Ujifusa & Douglas Matthews, THE ALMANAC OF AMERICAN POLITICS 1468 (2004)).

participate in local, state, and federal elections from burdensome time, place, and manner voting regulations intended to disenfranchise them.

Indian people were not made citizens of the United States until 1924. Even after passage of the Indian Citizenship Act, it took nearly 40 years for all 50 states to recognize that American Indians have the right to vote. For years, a number of states denied American Indians the right to vote because they were "under guardianship." In other places, American Indians were denied the right to vote unless they could prove they were "civilized" by moving off the reservation and renouncing their tribal ties. New Mexico was the last state to remove all express legal impediments prohibiting American Indians from voting in 1962, three years before the passage of the VRA in 1965. Although the American Indian right to vote in Arizona was recognized in 1948, it was limited to those who could pass the state literacy test, and therefore many American Indians could not vote in state and federal elections until after 1970.

Since the passage of the VRA, at least 73 cases have been brought under the Act or the Fourteenth or Fifteenth Amendment in which Indian interests were at stake.[41] The discrimination trends that emerge from these cases closely track the experience of African Americans, with discrimination shifting from *de jure* to *de facto* as the cases become more

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[41] Daniel McCool, Susan M. Olson & Jennifer L. Robinson, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 45 (2007).

recent. Recent cases focus on the discriminatory application of voting rules with respect to registration, polling locations, and voter identification.[42]

Native people continue to face ongoing struggles when trying to exercise their right to vote today, including overt hostility to Native voting. For example, in 2002 a South Dakota State legislator stated on the floor of the Senate that he would be "leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the state by giving up tribal sovereignty."[43]

"The most recent source of conflict to emerge is voter identification requirements."[44] Cases now pending in the lower courts squarely challenge voter identification statutes as applied to American Indians.[45] The district judge in *Amici* Navajo Nation

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42 *Id.* at 46; *see id.* at 48–68 (collecting cases).

43 *Boneshirt v. Hazeltine*, 336 F. Supp. 2d 976, 1046 (D.S.D. 2004) (quoting Rep. John Teupel).

44 *McCool et al., supra,* note 41, at 73; *see e.g., Purcell v. Gonzales*, 127 S. Ct. 5 (2006); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 286 (2004); Adam Cohen, *Editorial Observer; Indians Face Obstacles Between the Reservation and the Ballot Box*, N.Y. TIMES, June 21, 2004, www.nytimes.com.

45 *E.g., Inter Tribal Council of Arizona, et al. v. Jan Brewer*, 06-1362 (D. Ariz.); *Navajo Nation, et al. v. Jan Brewer*, 06-1575 (D. Ariz.). These cases have been consolidated with *Gonzales v. Arizona*, 06-1268 (D. Ariz.). Requiring non-English proficient American Indian voters to provide ID at the polls creates an additional burden for American Indian language speakers because they have less opportunity to

and Agnes Laughter's case will be scrutinizing this Court's forthcoming opinion for guidance in these cases.

V. THIS CASE SHOULD BE RESOLVED WITH A RULING IN PETITIONERS' FAVOR ON THE PRESENT FACIAL CHALLENGE.

Amici recognize that the instant case does not directly present to the Court the particular disparate impact—and, indeed, discriminatory intent—challenges that would be brought by Native Americans and that would require the invalidation of statutes such as Indiana's as applied to them. But the Court should be aware that its endorsement of the Indiana statute—even if only on a facial basis—likely would lead to the disenfranchisement of substantial numbers of American Indian voters until their "as applied" challenges could be heard and finally adjudicated.

As noted above, Missouri has already passed a similar voter ID law.[46] Additional states,

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avoid the ID requirement by voting early, voting absentee, or voting by mail. In Arizona, for example, individuals are encouraged to vote by mail or vote early to avoid the ID requirement, an option that is not available to most American Indian language speakers who utilize translators at the polls. Most Native Americans in Arizona vote at the polls, while in Maricopa County—the most populated county in Arizona—approximately 50% of electors vote early. This disparity places a severe burden on the right of voters who have no choice but to vote at polls.

46 *But see supra* note 8 (explaining that the Missouri Supreme Court found that the statute violated the Missouri constitution).

particularly those where tribes are located, would be encouraged to pass similarly restrictive voter ID statutes that require a photo ID card issued by either a state or the federal government. In 2007 alone, at least ten state legislatures have introduced voter ID bills that, like the Indiana statute, would require voters to present a photo ID issued by either a state or the federal government.[47]

Opponents of tribal voting rights currently can give no reason why states should not recognize the severe burden that photo ID requirements place on Native Americans. This Court should be careful not to create such a reason. Accordingly, and for the reasons set forth in Petitioners' briefs, Amici agree with Petitioners that the Court should find the Indiana statute on its face to violate the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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47 Alabama: H.B. 381, 2007 Reg. Sess. (Al. 2007); Arkansas: H.B. 2120, 86th Leg. (Ark. 2007); California: S.B. 173, 2007-2008 Reg. Sess. (Cal. 2007); Hawaii: H.B. 1133, 24th Leg. (Haw. 2007); Maine: L.D. 1783, 123rd Leg. (Me. 2007); Missouri: S.B. 596, 94th Leg. (Mo. 2007); North Carolina: S.B. 779, 2007 Gen. Assem. Reg. Sess. (N.C. 2007); Oklahoma: S.B. 778, 51st Leg. (Okla. 2007); Oregon: S.B. 876, 74th Leg. (Or. 2007); Tennessee: H.B. 670, 105th Leg. (Tenn. 2007); *see also* H.B. 638, 185th Leg. (Mass. 2007) (would also accept Social Security card).

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